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No. 83-

ALEXANDER L. STEVAS.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BAY HEAD IMPROVEMENT ASSOCIATION,

Petitioner,

v.

VIRGINIA MATTHEWS and STANLEY VAN NESS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY**

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58pp

Questions Presented For Review

1. May a state court, consistently with the Fifth and Fourteenth Amendments, without compensation, expand the "public trust doctrine" to grant the general public a right of "recreational use" of dry sand beach property when the court and the parties below agreed that the state had previously protected the property as private?

2. May a state court deprive private property of the protections of the Fifth and Fourteenth Amendments by holding, as a matter of first impression, that the property is "quasi-public" because it is owned or leased by a voluntary non-profit association whose members have contracted for the joint maintenance, supervision, use and policing of its and their property and which, like other non-profit groups, has received some benefits from the municipality?¹

¹ The petitioner, Bay Head Improvement Association, has no corporate affiliates. The parties to the proceedings in the Supreme Court of New Jersey, in addition to Petitioner and Respondents, were: Philip D. Reed, Jr.; Paul E. Parker and Catherine Parker, H/W; James L. Tyson and David O. Tyson; John Bowman Delaney; Robert L. Johnson and Roberta Johnson, H/W; Helen Loblein; Martha L. Van Emburgh; H. Corbin Day; Carol C. Schmitz; Benjamin Barnett and Catherine, H/W; Katherine W. Fortenbaugh; George P. Egbert; Lester D. Egbert; George O. Nodyne; Andrew H. Campbell; Joseph Shelby and Miriam Rohrer Shelby; Bruce B. Swenson and Nancy T. Swenson, H/W; Ferdinand W. Roebing, III; Dorothy Anderson and Clifford O. Anderson; Estate of Eileen Rucker; Mary G. Hill; Robert S. Corbin; John A. Brown; George R. Schultz; Edward McGrath and Elizabeth McGrath, H/W; Walter H. Brown and Catherine Brown, H/W; Alfred E. Johnson, Jr; Edward F. and Joan Van Johnson, H/W; John Magee and Elizabeth Magee, H/W; Frank J. O'Brien; Edith Wells Pardoe; George H. and Estelle M. Sands, H/W; Clyde A. Szuch; Joseph Decibus and Hazel Decibus, H/W; Frederick Mellor; William De Bray and Vilma DeBray, H/W; Elizabeth M. Heath, F. W. Clark and Lucille Clark, H/W; Henry Thuman; Elizabeth Matthews; Paul Samborn; Howard McClintic; Donald Lusardi; Henry C. Day; M. Dickinson; Margaret B. Dunn; Dick Zuver and Jean Zuver, H/W; Albert Robert Johnson; Andrew Conte; Richard Otto and Judith Otto, H/W; Gordon A. Willspangh, Elizabeth Hanus; Rebekah Collins; Maria A. Carmichael; Herbert J. Garmbow; Carolyn L. Ottley; Frank E. Curran, Jr.; Darwin James, Jr; William H. Nimick, III; Clark Estate; Marian R. Reichel; Lawrence Bathgate and Pamela Bathgate, H/W; Ricardo Mestres; Beverly Robertson; William Spofford; Austin Starkey; Henry Gibson; Henry Smith; Barr Elizabeth Loizeaux; Albert Dittman; Tristina Johnson; Quail Hill Estates; Ash Association; Malvern C.

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No.

BAY HEAD IMPROVEMENT ASSOCIATION,

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v.

VIRGINIA MATTHEWS AND STANLEY VAN NESS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY**

Reference to the Opinion Below

The decision of the Supreme Court of the State of New Jersey was filed on February 2, 1984 and is reported at 95 N.J. 306, 471 A.2d 355 (1984). The opinion, which is reproduced in the appendix to this petition, commencing with page 1a, constitutes the judgment of the New Jersey Supreme Court, and no other judgment or mandate is required. *N. J. Ct. R.*, R.2:11-3(b).

Jurisdictional Statement

The judgment of the Supreme Court below was entered on February 2, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3)(1966), upon the grounds that the Petitioner claims a right under the United States Constitution not to have its property taken without due process of law and without just compensation.

Constitutional and Statutory Provisions

The principal issues in this case are whether the application and interpretation of the "public trust" doctrine by the court below and its interpretation of the phrase "private property" violate the Due Process Clause of the Fourteenth Amendment — "... nor shall any State deprive any person of . . . property, without due process of law . . ."; and the Taking Clause of the Fifth Amendment — "... nor shall private property be taken for public use, without just compensation."

Statement of the Case

The result of the decision below is to take dry sand² beach front property owned by the Petitioner, a private non-profit membership corporation of property owners, as well as property owned by its members, and to open it to public use for recreation without compensation. Although the decisional and statutory law of New Jersey has always protected private ownership of dry sand beachfront property, the New Jersey Supreme Court failed to recognize that its judicially-ordered right of public recreation on private property violates the Fourteenth and Fifth Amendments. Instead, the court avoided the issue by finding that the Petitioner, the Bay Head Improvement Association ("Association") is "quasi-public." In addition, the court ordered it to assume the responsibilities of a public agency.

The Property Involved

The Borough of Bay Head is a residential community in Ocean County, New Jersey, which, at the time of the decision had a population of less than 6,500 during the summer months.

²The land "covered by tidal waters" is generally referred to as the "wet" sand area or the area between the high tide and low tide marks. It was also, in the British tracts, referred to as "the foreshore" and "the sea-shore." The beach landward of the high tide mark continuing to a seawall, bulkhead or vegetation line is generally referred to as the "dry" sand area or the "uplands." See 3a n.1.

9a. The Bay Head beach, which borders the Atlantic Ocean, is approximately 6,600 feet in length, and is contiguous with a public beach in an adjacent community. 5a, 7a.

During the nineteenth century and the beginning of this century, the State of New Jersey conveyed riparian grants for more than one-third of the Bay Head beach to private owners. Under the express terms of those grants, the owners, and their successors in title, have the exclusive right to use and possess their beachfront property, including the land extending 1,000 feet seaward of the high water mark and into the Atlantic Ocean. 6a; PA 2³. The deeds for the other beachfront property in Bay Head generally provide for use and possession at least from the high water mark landward. DA194-96.

The Bay Head beachfront property is owned by private owners, a portion by the Association and the balance by individual private owners, some but not all of whom are members of the Association. The Association is a non-profit membership corporation with its principal purpose "the improving and beautifying . . . cleaning, policing and otherwise making attractive and safe the bathing beaches . . . and the doing of any act . . . for the greater convenience, comfort and enjoyment of the residents." 5a. The members incorporated the Association in 1932 in order to protect and to maintain the privacy of their property and, to that end, the Association acquired beach property abutting the street-ends "for control." PA 264.

Over the years, the Association also acquired the title to some beachfront property. In addition, leases were obtained from some owners of oceanfront property for the land seaward of their bulkheads in return for the Association's agreement to clean, maintain and police that part of the beach during the summer. The leases were revocable upon 30 days' notice. 5a-6a; PA 526.

Property owners in Bay Head, who were approved by the membership committee, and who paid the registration dues,

³The record below is designated by reference to the Plaintiffs' Appendix ("PA") and Defendants' Appendix ("DA") filed with the New Jersey Supreme Court.

were entitled to become members of the Association, as were the other members of their household, guests of property owners, including hotel guests, and lessees of cottages in Bay Head. 6a; PA 513 and 516. Members of the Association and their guests received badges which signified their right to enter on the beach portion of the property of the Association. The Association maintained personnel on streets ending in the beaches to ensure that only those wearing badges entered onto the beach. 6a; PA 402-405.⁴ Excluded members of the public, however, could gain access to the wet sand area from adjoining public beaches and wet sand areas north and south of the Bay Head beaches. 7a.

The Borough of Bay Head has not owned nor claimed jurisdiction over the beach and has never supplied facilities for those who use it. PA 4. Instead, the expenses for maintaining the beach were shared by the Association's members through assessment of membership dues. 6a; PA 312-13. The private property owners, for example, paid the costs for constructing the seawalls. PA 318. Its members paid property taxes, and the Association did as well, at least since 1975. PA 325, 468. The Association, like many other groups such as the Girl Scouts, was permitted to use the Borough Hall. 22a; DA 224. In addition, it received from the Borough \$600 annually between 1936 and 1941, and \$1,000 in 1969. 22a. The state, county, and borough shared the expense of constructing six groins (stone jetties) to guard against beach erosion after extensive storm damage in 1962. *Id.*

The Proceedings Below

This action was commenced on April 1, 1974 in the New Jersey Superior Court, County of Ocean, by the Borough of Point Pleasant against the Borough of Bay Head and the Petitioner Bay Head Improvement Association. PA 15. Thereafter, Virginia Matthews (a resident of neighboring Point Pleasant) and

⁴From Labor Day to Memorial Day, the Association did not provide lifeguard services, clean the beaches, or employ security personnel. PA 304, 397-98.

Stanley Van Ness (as Public Advocate⁵) intervened as plaintiffs. PA 45. In their complaints, they sought to obtain, on behalf of the public, a "right of access to and use of" the property fronting the ocean in Bay Head. PA 52. The complaint was eventually amended to include more than 100 individuals as defendants who owned an interest in beachfront property in Bay Head. PA 53-59. Ultimately, the Borough of Point Pleasant ceased to prosecute the case and the Borough of Bay Head was dismissed as a defendant because it did not own or operate the beach. 3a-4a.

Depositions were taken and answers to interrogatories and requests to admit were filed with the trial court. On that record, summary judgment with prejudice was granted for all the defendants, the individual owners and the Association, PA13; and the Superior Court, Appellate Division, affirmed the judgment. The plaintiffs appealed to the New Jersey Supreme Court as of right and also filed a petition for certification which was granted.

In an unanimous opinion, with one justice abstaining, the New Jersey Supreme Court affirmed the judgment of dismissal of the individual property owners, but, "without prejudice," and reversed the judgment as to the Association.

The Relief Granted

The relief granted against the Association is to require, effective June 1, 1984, that "membership in the Association . . . be open to the public at large . . . [for] access to the common beach property during the hours of 10:00 a.m. to 5:30 p.m. between mid-June and September, where they may exercise their right to swim and bathe and to use the Association's dry sand area incident to those activities" and that "the Association . . . also make available a reasonable quantity of daily as well as seasonal badges to the nonresident public." 24a.

⁵The Public Advocate is a state-funded office which institutes legal proceedings on behalf of what it perceives to be the public interest.

Although the judgment below purports to directly burden only the Association's property (owned and leased from its members), it adversely affects also all of the comparable property owned by individual residents of Bay Head who are not members of the Association. The Appellate Division had dismissed the complaint as to such individual property owners with prejudice. The Supreme Court altered that protective ruling and made the dismissal to be without prejudice.

Unmistakably, the court's purpose in doing so was to keep the individual property holdings of owners who were not members of the Association exposed to the risk of an uncompensated taking upon the expansion of the public's needs at some future time:

We have decided that the Association's membership and thereby its beach must be open to the public. That area *might* reasonably satisfy the public need at this time. We are aware that the Association possessed, as of the initiation of this litigation, about 42 upland sand lots under leases revocable on 30 days' notice. If any of these leases have been or are to be terminated, or if the Association were to sell all or part of its property, *it may necessitate further adjudication* of the public's claims in favor of the public trust on part or all of these or other privately-owned upland dry sand lands depending upon the circumstances. However, *we see no necessity to have those issues resolved judicially at this time* since the beach under the Association's control will be open to the public and may be adequate to satisfy the public trust interests.

25a (emphasis supplied). The present erosive effect of this cloud upon the value of the private owners' property is not quantified in the record nor an issue in the present proceedings, but it is manifest upon the face of things.

The Opinion of the New Jersey Supreme Court

The court below acknowledged the novelty of its reasoning and result. First, its fairly recent decision dealing with municipally-owned land, *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) itself rep-

resented, in the court's view, an "extension" of the public trust doctrine which "historically" included rights to navigation and fishing to include also "recreational uses, including bathing, swimming and other shore uses" upon municipal beach land. 12a-13a. The court, moreover, recognized that in New Jersey sovereign title "for the public use" to tidelands had not been exclusively exercised or preserved subsequent to the 1821 decision in *Arnold v. Mundy*, 6 N.J.L. 1, which established the rights of fishing and navigation in this state's tidewaters. 11a-12a n.5.⁶

Next, said the court:

Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309.

* * *

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.

18a.

In the present proceeding the court significantly extended the public trust doctrine by explicitly holding that dry sand property

⁶The court said:

Despite the language in *Arnold v. Mundy*, there developed the notion that a shoreowner could obtain unrestricted ownership rights in the tidelands. See *Gough v. Bell*, 22 N.J.L. 441 (Sup. Ct. 1850), *aff'd*, 23 N.J.L. 624 (E. & A. 1852); see also *Ross v. Mayor of Edgewater*, 115 N.J.L. 477, 485 (Sup. Ct. 1935), *aff'd o.b.*, 116 N.J.L. 447 (E. & A.), *cert. denied*, 229 U.S. 543, 57 S. Ct. 37, 81 L. Ed. 420 (1936). . . The Legislature, at least up to the 1860's, granted corporate charters that included powers to occupy, possess and enjoy tide flowed land. See, e.g., *L.* 1833 p. 92. In addition, the Legislature had from time to time made direct grants of riparian lands.

owned by private parties is burdened both by a right of public passage and by public recreational use:

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

17a (citation and footnote omitted).

As to the land owned by or leased to the Association itself, the court reasoned that "[t]he Association's activities paralleled those of a municipality in its operation of the beachfront," 22a, and that "[i]f the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore." 24a. At the same time, the court acknowledged that "only four of the forty-eight municipalities have no publicly-owned dry beach," *id.* at n.10, and that the Bay Head beach is located alongside a public beach. *See* 7a.

The Court concluded by recognizing that the purpose and effect of its decision was to appoint the Association and its members agents for the public. It left to the Association the task of issuing appropriate regulations and determining the steps necessary to implement its decision:

Although such membership rights to the use of the beach may be broader than the rights necessary for enjoyment of

the public trust, opening the Association's membership to all, nonresidents and residents, should lead to a substantial satisfaction of the public trust doctrine. However, the Association shall also make available a reasonable quantity of daily as well as seasonal badges to the nonresident public. Its decision with respect to the number of daily and seasonal badges to be afforded to nonresidents should take into account all relevant matters, such as the public demand and the number of bathers and swimmers that may be safely and reasonably accommodated on the Association's property, whether owned or leased.

24a-25a.

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Significant and Recurring Constitutional Issues Affecting the Rights of Property Owners and The Constitutional Reach of the Public Trust Doctrine

Preliminary Statement

It is well to begin with a short description of what this case does not involve. First, this is not a case where the court fashioned its right of access by resort to traditional doctrines of property ownership, such as "easements by prescription" or "easements by dedication." Indeed, it could not do so because these claims were abandoned by the plaintiffs below and are not applicable here. 4a; PA 142; *see* n.21, *infra*.

Second, this is not a case where the court interpreted and applied a legislative enactment, which is the exclusive means available under New Jersey's doctrine of separation of powers for the exercise of the power of eminent domain.⁷

⁷*State by McLean v. Lanza*, 27 N.J. 516, 529-30, 143 A.2d 571 (1958), appeal dismissed, *sub nom.*, *Lanza v. New Jersey*, 358 U.S. 333 (1959); *Abbott v. Beth Israel Cemetery Ass'n*, 13 N.J. 528, 543-44, 100 A.2d 532 (1953); *Bergen County Sewer Authority v. Borough of Little Ferry*, 5 N.J. 548, 552, 76 A.2d 680 (1950).

What this case does concern is a super-legislative act by a state court to provide for what it views as increased public demand for beaches which "must be accompanied by intermittent periods of rest and relaxation beyond the water's edge." This is to be accomplished at the expense of private property owners and not the public at large.

The vehicle chosen by the court to implement its decision is both novel and, we submit, compels review of the decision below. By the simple expedient of attaching the "quasi-public" label to the Association, the court converted the property of its members into a public recreational site and evaded the requirements of New Jersey property law and the United States Constitution. The effect on the immediate parties is obvious: henceforth the Association and its members must admit segments of the public onto their property and they must, presumably, assume all of the burdens of regulation and supervision which that entails. In addition, they must, presumptively, suffer the consequences of lost privacy and diminution in property value, a matter of no small consequence, particularly to the owners who had every good reason to expect that their land would remain private property.

There are additional and equally troublesome aspects of the court's decision beyond its impact on these parties. The idea that because an association receives some benefits from a community, its property is not "private" and that a court may foist on it duties and responsibilities to the public at large, could have serious consequences for a number of private organizations. The notion, moreover, that the public's demand for recreation justifies usurping private property rights raises vexing questions about the reach of the decision. Horseback riding, skiing, skating, swimming, fishing, boating upon inland lakes, baseball and even hot air ballooning, are all increasingly popular and common recreations conducted on public park land. If the public's enjoyment of tidal waters may be extended onto adjacent private land merely because it is adjacent, as the opinion below concludes, there is no reason why the horseback rider or skier should respect the boundaries between the park land and adja-

cent private land, or that the canoeist should not picnic upon the lawn of a lake-front cottage.

These are all problems, of course, best dealt with by legislatures and those agencies to which the state assembly has delegated public responsibilities. Here, however, by *ipse dixit*, the court below transformed "private" property into "public" property, thereby usurping the authority of the State legislature and the public officials appointed by it to acquire recreational resources for the use of the public.⁸ From this extraordinary decision, those whose property rights were taken have no recourse except in this Court.

In *Hughes v. Washington*, 389 U.S. 290 (1967), as here, the guiding principle is this:

[T]o the extent [the decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no . . . deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

Id. at 296-97 (Stewart, J. concurring).⁹

⁸For a description of relevant New Jersey and federal legislation which provides for purchase and/or condemnation by eminent domain of beachfront rights for public recreation, see n. 18, *infra*.

⁹This case is one in an ever-expanding line of state court decisions not infrequently characterized as based on "fiction" and prompted by the state courts' views that the legislatures have gone too far in protecting private property rights to the detriment of "public" desires. Note, "Public Access to Beaches," 22 *Stanford L. Rev.* 564, 577 (1970). See also, Note, "The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine," 79 *Yale L.J.* 762, 775-76 (1970); Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," 68 *Mich. L. Rev.* 473, 557-59 (1970); Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 *N.Y.U. L. Rev.* 369 (1973); Travis, "Assault on the Beaches: 'Taking' Public Recreational Rights to Private Property," 60 *Boston L. Rev.* 933 (1980).

The Property Owned by the Association and its Members is Constitutionally Protected Private Property

It goes without saying that the Fourteenth Amendment protects settled expectations derived from state property law from disruption by the government in the absence of fair compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *Ettor v. Tacoma*, 228 U.S. 148, 156 (1913). Here, as noted above, the court itself conceded that its decision went beyond the bounds of prior law, and the plaintiffs in the court below repeatedly urged that the result would be "precedent setting."¹⁰ Indeed, the state of New Jersey has always, including to the present session of the state legislature, protected the property rights of dry sand beachowners.¹¹

When New Jersey became a state, it expressly adopted the common law of England,¹² which forbade swimming by the public if a trespass was committed on private property to reach the sea. The British public trust doctrine always held that only the rights to the water itself for navigation and fishing, and not the shoreland, were common rights.¹³ New Jersey has consistently

¹⁰E.g. Appellant's Brief p. 21.

¹¹Justinian, quoted by the court below at length, held that the public did not have any navigational or fishing rights, or any rights at all, beyond the highest high water mark: "The sea-shore, that is, *the shore as far as the waves go furthest*, was considered to belong to all men." Justinian, *Institutes* 2.1.1. (Sandars Ed. 1876 at p. 158) (emphasis supplied).

See also, *Shively v. Bowlby*, 152 U.S. 1, 21-23 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412-13 (1842).

¹²N.J. CONST. of 1776 art. 22.

¹³Note, *supra*, 79 Yale L.J. at 781-85; see Hale, 1 *De Jure Maris* 17-25 (Hargrave Ed. 1787); *Angell on Watercourses*, § 551 (Perkins Ed. 1869); Taylor, "The Seashore and the People," 10 *Cornell L.Q.* 307-08 (1925); Halsbury, 28 *Laws of England* 372-73 (1914); Coulson and Forbes, *The Law of Waters* 14-15, 46-47 (2d. Ed. 1902). In *Blundell v. Catterall*, 106 Eng. Rep. 1190, 5 B. & Ald. 268 (1821), the dissent to which is quoted by the court, Lord Chief Judge Abbott actually held that there was no common law right to swim

enacted statutes compatible with the British doctrine¹⁴ and the courts of New Jersey have protected property rights not only in the dry sand but even in the wet sand areas under express grants of the state or under acts of appropriation by private persons. In *Ross v. Mayor of Edgewater*, 115 N.J.L. 477, 483-84, 180 A. 866, 870, (Sup. Ct. 1935), *aff'd per curiam*, 116 N.J.L. 447, 184 A. 810 (E. & A.) *cert. denied*, 299 U.S. 543 (1936), the Supreme Court of New Jersey, following the British rule, stated that only navigable waters are held by the sovereign in trust for the people; the public's title to the underlying wetlands, where it existed at all, is "strictly proprietary" and absolutely defeasible. This Court has recognized the rule as applicable in New Jersey in *Mayor of Hoboken v. Pennsylvania R. R. Co.*, 124 U.S. 656, 689 (1888).¹⁵

Thereafter, various lands below the high water mark acquired by riparian owners pursuant to doctrines of local custom were held to be protected. *O'Neill v. State Highway Dep't*, 50 N.J. 307, 325, 235 A. 2d 1, 10 (1967). Although the state's title to tidelands could not be lost by adverse possession or prescription, *id.* at 320, 235 A.2d at 8, the courts continued to uphold the rights of express grantees of the state, and the rights of all owners to the beach landward of the high water mark.¹⁶

and that access across a privately owned shore for this purpose could amount to a trespass.

¹⁴See N.J. Stat. Ann. § 40:48-1(9) (West 1967) ("The governing body of every municipality may make and enforce ordinances to . . . (a) Regulate or prohibit swimming or bathing in the waters of, in, or bounding the municipality;" L. 1927 c. 130 N.J. Stat. Ann. 58: 8-1 (West 1982), repealed in 1977 as part of an act relating to contamination of water ("It shall be lawful to bathe or swim in any of the fresh waters of this State; provided, that in so doing no trespass is committed"); N.J. Stat. Ann. § 40:61-1 (West 1967) ("The governing body of any municipality may . . . a. Acquire . . . beaches, water fronts and places for public resort and recreation . . . in fee or less estate . . . by gift, devise, purchase or condemnation"); N.J. Stat. Ann. § 12:3-7, 12:3-9 (West 1979) (providing for payment in the event riparian rights of state grantees of lands under water are extinguished).

¹⁵See also, *Burkhard v. H.I. Heinz Co.*, 71 N.J.L. 562, 60 A. 191 (E. & A. 1905); *Bell v. Gough*, 23 N.J.L. 624, 657, 661-65 (E. & A. 1852).

¹⁶*Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 357, 240 A. 2d 665, 667 (1968); *Bailey v. Driscoll*, 19 N.J. 363, 367, 117 A. 2d 265, 267 (1955); *State by State Hwy. Comm'r. v. Maas & Waldstein Co.*, 83 N.J.

The court's finding that the property belonging to the Association and its members is not private property, moreover, belies the common law doctrines previously applied in New Jersey, which strictly define the circumstances in which private property may be subject to public use. These principles were inapplicable to the plaintiffs here—and they reaffirmed as much when they consented to summary judgment dismissing their claims of prescriptive easement and public dedication.¹⁷ The common law restrictions on the public trust have been recognized by the legislature as recently as 1984.¹⁸ Moreover, a special commission of

Super. 211, 220, 199 A. 2d 248, 252 (App. Div. 1964); *Schultz v. Wilson*, 44 N.J. Super. 591, 597-98, 131 A.2d 415, 417-18 (App. Div.), *certif. denied* 24 N.J. 546, 133 A. 2d 395 (1957); *United States v. 50 Foot Right of Way*, 337 F.2d 956, 960 (3d Cir. 1964).

¹⁷We are unaware of any other state court decision extending to the public the use of privately owned beach property absent either a purported finding of a prescriptive easement, dedication to the public or customary public usage from "time immemorial." See *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P. 2d 50, 84 Cal Rptr. 162 (1970); *Leabo v. Leninski*, 182 Conn. 611, 438 A.2d 1153 (1981); *Smith v. Bruce*, 241 Ga. 133, 244 S.E. 2d. 559 (1978); *State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979); *In re Opinion of the Justices*, 365 Mass. 681, 313 N.E. 2d 561 (1974); *Department of Natural Resources v. Ocean City*, 274 Md. 1, 332 A.2d 630 (1975); *Department of Natural Resources v. Cropper*, 274 Md. 25, 332 A.2d 644 (1975); *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763, 330 N.Y.S. 2d 495 (Sup. Ct. 1972), *aff'd*, 45 A.D. 2d 841, 358 N.Y.S. 2d 957 (1974); *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P. 2d 671 (1969); *State v. Beach Co.*, 271 S.C. 425, 248 S.E. 2d 115 (1978); *see also*, *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978); Note, *supra*, 79 Yale L.J. at 786 (1970) ("It is a rare court that would admit to using such a vague criterion as the 'public interest' to determine foreshore disputes. This is a job best left to the legislature."); Note, *supra*, 22 Stanford L. Rev. at 580 (1970) ("Even the great public need for beach recreation is not in itself sufficient reason to take beaches from their owners").

¹⁸Comprehensive federal and state legislation and accompanying administrative regulations were adopted in New Jersey between 1961 and 1984, all of which provide for acquisition by purchase or condemnation by eminent domain of property and access rights for recreational use by the public, including beach front property. See New Jersey Green Acres Land Acquisition Act of 1961, N.J. Stat. Ann. § 13:8A-1 *et seq.* (West 1979); N.J. Admin. Code tit. 7 § 36-6.12(b) (1979); Coastal Zone Management Act, 16 U.S.C. § 1451, 1452(2)(D) (West Supp. 1984). In April 1977, a legislative commission recommended that the Department of Environmental Protection "identify where privately-owned property blocks the general public from access to the beach over excessively long stretches and purchase selected access ways to the

the New Jersey Legislature on access to beaches and the relevant state agencies have construed the public trust doctrine as inapplicable "to the dry sand beaches which are owned by either local, state or federal government, or by private individuals or associations."¹⁹

Prior to the decision at hand, the New Jersey Supreme Court's most expansive view of the public's "right to recreation" on littoral property was expressed in two opinions, both of which post-date the Association's acquisition of its property and both of which dealt solely with municipally-owned land, not private property. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, *supra*; *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1979). In *Lusardi v. Curtis Point Property Owners Ass'n.*, 86 N.J. 217, 228, 430 A. 2d 881, 886 (1981), the court again emphasized that the public trust doctrine developed by it until that time extended only to wet sand areas except those of municipally-owned public beaches, as the court indeed again reiterated in its opinion here. 13a.²⁰

This is a case, therefore, where there should have been no doubt that the property of the Association and its members is and always has been "private property" as the term is used in the Fifth and Fourteenth Amendments.

beach with State Green Acres and Federal Coastal Zone Management shorefront access funds." New Jersey Beach Access Study Commission, "Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey," 11 (1977) (hereafter "Access Study"); DA 254; *see also*, 15 C.F.R. § 920.17 (1983). On January 17, 1984, the Governor of New Jersey signed the Open Lands Management Act, L. 1983 c. 560, which appropriated \$250,000 to administer a voluntary program designed to provide private land-owners with financial assistance and in-kind service for projects designed to develop and maintain that land for recreational purposes, in exchange for a guarantee, in the form of an access covenant, that the public be permitted recreational use of their property.

¹⁹New Jersey Department of Environmental Protection, *Public Access to the New Jersey Shore*, p. 1 (1983); Access Study, *supra* at 1; DA 244.

²⁰Even those commentators shocked by the decisions in *Avon* and *Deal* opined that it was unlikely the court would go any further. Note, "Water Law—Public Trust Doctrine Bars Discriminatory Fees to Non-Residents for Use of Municipal Beach," 26 *Rutgers L. Rev.* 180, 185 (1972); *see also*, Note, *supra*, 48 *N.Y.U.L. Rev.* at 381-85.

Nevertheless, the Supreme Court, relying on state action doctrines, erroneously converted the property of the Association and its members from private to "quasi-public." None of the factors relied upon by the court, taken separately or together, is sufficient to find governmental action even against competing constitutional rights, let alone "recreational" claims.

First, the court below asserted that "[t]he lifeguards performed the functions characteristic of those on a public beach." 22a. New Jersey law, however, expressly contemplated that private firms and corporations could maintain seashore bathing pavilions and required that such enterprises retain lifeguards. N.J. Stat. Ann. § 5:1-2, 5:1-4 (West 1973). Their employment, as well as the employment of security guards and maintenance crews to protect and maintain the privacy of the members' property, is consonant with private, as opposed to public, ownership. Here, no one seriously claimed that the Association and its members were "performing the full spectrum of municipal powers and stood in the shoes of the state." *Lloyd Corporation v. Tanner*, 407 U.S. 551, 569 (1972). Use of the Borough Hall alongside of other civic groups and the receipt of some community benefits cannot convert the property of the Association and its members to public use. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841-43 (1982); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173-75 (1972).

Prior to the decision in this case, the courts in New Jersey had explicitly held that the activities of a borough in cleaning and in protecting a beach by building groins "were not of such a nature as to destroy any property rights in the property owner," *Spiegle v. Borough of Beach Haven*, 116 N.J. Super. 148, 161, 281 A.2d 377 (App. Div. 1971); nor were they sufficient "to create a prescriptive easement for beach purposes in the public through the borough's activities." *Id.*²¹

²¹In New Jersey, dedication requires an unequivocal act manifesting an intent to dedicate. *George Van Tassel's Community Funeral Home, Inc. v. Town of Bloomfield*, 8 N.J. Super. 524, 528, 73 A.2d 636, 637 (Ch. Div. 1950). The record in this case—indeed the facts prompting the instant litigation—makes it clear that the Association and its members intended to protect and maintain their property for their own use. Equally well settled in New

There can be no question but that a government-mandated right in the public to recreational use of private residential property constitutes a "taking" within the protective ambit of the Fifth Amendment. The point of departure, then, is whether the court's implication that prior state grants and decisions wrongly gave up the "public trust" should have given way to the "number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for." *Kaiser Aetna v. United States*, *supra*, 444 U.S. at 179.

As this and other courts have time and again affirmed, an individual's right to exclude the general public from his property is an essential attribute of private ownership. In *Kaiser*, Justice Rehnquist wrote that "one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others." 444 U.S. at 176. In that case, the plaintiffs urged that the public had the right to use a private marina with access to the sea because it was navigable; this Court held that such action would constitute a physical invasion of the property for which the owner must be compensated. *Id.* at 180.²²

Jersey is the principle that the public cannot acquire rights to the use of property of others by prescription. *Albright v. Cortright*, 64 N.J.L. 330, 333, 45 A. 634, 635 (E. & A. 1900); *Camp Clearwater, Inc. v. Plock*, 52 N.J. Super. 583, 602, 146 A.2d 527 (Ch. Div. 1958), *aff'd*, 59 N.J. Super. 1, 157 A.2d 15 (App. Div. 1959); *Fidelity Union Trust Co. v. Cochrane*, 116 N.J. Eq. 190, 192, 172 A. 800 (Ch. 1934); *Ackerman v. Shelp*, 8 N.J.L. 125 (Sup. Ct. 1825). Moreover, a private claimant to a prescriptive easement must demonstrate an entry and persistent possession which has been exclusive, continuous, uninterrupted, visible and notorious, under a claim of right for the requisite period of time, in this case sixty years. *Plaza v. Flak*, 7 N.J. 215, 220, 81 A.2d 137 (1951); *Baker v. Normanoch Ass'n., Inc.*, 25 N.J. 407, 419, 136 A. 2d 645 (1957); *Mannillo v. Gorski*, 54 N.J. 378, 386, 255 A.2d 258 (1969). The use of the beach during the summer months by the Association was by permission of the member property owners and therefore negated any "claim of right" necessary to establish possession or a prescriptive easement in the beach by the Association or anyone who used the beach with the permission of the Association. *Spiegle v. Beach Haven*, *supra*.

²²See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80 (1980); *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co.*

Furthermore, this Court, in a long line of decisions involving activity by the United States, has limited the power of the government to damage or invade riparian and littoral property without compensating the owner. This has been permitted only in situations where the activity is in furtherance of navigation or commerce and where the land above the high water mark is not invaded—factors which are not here present.²³ The consistent theme of these decisions is that the navigational servitude creates “ample notice over the years that such property is subject to a dominant public interest.” Accordingly, the rule must be “to deny compensation where the claimant’s private title is burdened with this servitude but to award compensation where his title is not so burdened.” *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 808 (1950) (footnote omitted).

Here, the titles to the land owned by the Association and its members were never burdened by a servitude in favor of the public’s interest in beach recreation. Nor had the state legislature and the agencies it designated to acquire beachfront property exercised their power of eminent domain. Instead, the court usurped the roles of the legislature and extended the public trust doctrine to permit public use of the Bay Head beachfront.

In sum, the New Jersey Supreme Court addressed the rights of private property owners against claims that the public has a “recreational” right to use their property and found, for the first time, that the demands of the public permit a wholesale denial of the right to exclude others. This intrusion onto the property of the Association and its members, without payment of just compensation, violates the Fourteenth and Fifth Amendments of the United States Constitution.

v. United States, 260 U.S. 327 (1922); *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977).

²³*United States v. Twin City Power Co.*, 350 U.S. 222, 224–25 (1956); *United States v. Kansas City Life Insurance Co.*, 339 U.S. 799, 806–808 (1950); *United States v. Willow River Power Co.*, 324 U.S. 499, 508 (1945); *United States v. Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592 (1941); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *United States v. 50 Foot Right of Way*, *supra*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be issued to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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Dated: May 2, 1984

**OPINION OF THE SUPREME COURT
OF
NEW JERSEY**

VIRGINIA MATTHEWS, PLAINTIFF-APPELLANT, AND
STANLEY C. VAN NESS, PUBLIC ADVOCATE OF
THE STATE OF NEW JERSEY, PLAINTIFF-INTER-
VENOR-APPELLANT, v. BAY HEAD IMPROVEMENT
ASSOCIATION, A NON-PROFIT CORPORATION
OF THE STATE OF NEW JERSEY, *et al.*

Argued May 10, 1983—Decided February 2, 1984.

SYNOPSIS

Suit was brought against nonprofit association which controlled access to municipal beachfront and owners and others who had interest in properties located on beachfront, asserting that defendants denied general public its right of access to public trust lands on the beaches in municipality and its right to use private property fronting on the ocean incidental to public's right under the public trust doctrine. The Superior Court granted defendants' motions for summary judgment, and plaintiffs appealed. The Superior Court, Appellate Division, affirmed. After granting plaintiffs' petition for certification, the Supreme Court, Schreiber, J., held that; (1) public must be given both access to and use of privately owned dry sand areas as reasonably necessary under public trust doctrine; (2) nonprofit corporation which had virtual monopoly over beachfront was a quasi-public association, considering its purposes, relationship with municipality, communal characteristic and activities; and (3) by limiting membership only to residents of municipality and foreclosing the public, association was acting in conflict with strong public policy in favor of encouraging and expanding public access to and use of shoreline areas and was frustrating public's right under the public trust doctrine, and thus association would be required to open membership to public at large.

Affirmed in part; reversed in part.

SUPREME COURT OF NEW JERSEY, 1984.

95 N.J.

Matthews v. Bay Head Imp. Ass'n.
Cite as, 95 N.J. 306

Sandra T. Ayres, Deputy Public Advocate, Division of Public Interest Advocacy, argued the cause for appellants (*Joseph H. Rodriguez*, Public Advocate, attorney).

Alvin Weiss argued the cause for respondents Clifford O. Anderson & Dorothy Anderson; Benjamin & Catherine Barnett, h/w; John A. Brown; Walter H. Brown & Catherine Brown, h/w; Andrew H. Campbell; H. Corbin Day; Samuel B. Fortenbaugh, Jr. & Katherine W. Fortenbaugh, h/w; Gregory Gibson; Mrs. Paul Hay; Edward H. Hein; Harold L. Herbert; Edward F. & Joan Van Johnson, h/w; Robert King; Edward McGrath & Elizabeth McGrath, h/w; Ann F. Mestres; Paul E. Parker & Catherine Parker, h/w; Philip D. Reed, Jr.; Estate of Eileen Rucker; George H. & Estelle M. Sands, h/w; Herman Schmitz; Joseph Shelby & Miriam Rohrer Shelby; David O. Tyson; James L. Tyson and Christine Wilder (*Riker, Danzig, Scherer & Hyland*, attorneys; *Glenn Clark* and *Andrew Manshel*, on the brief).

John R. Weigel argued the cause for respondents John A. Brown; Robert S. Corbin & Dorothy L. Corbin, h/w; Samuel B. Fortenbaugh, Jr., & Katherine W. Fortenbaugh, h/w; Max Habernickel, III & Gael S. Habernickel, h/w; J. Stuart Hill & Mary G. Hill, h/w; Ricardo A. Mestres, Jr.; George O. Nodyne & Anne K. Nodyne, h/w; Philip D. Reed, Jr. & Elizabeth B. Reed, h/w; Ferdinand W. Roebeling, III; Carol C. Schmitz; George R. Schultz and Bruce B. Swenson & Nancy T. Swenson, h/w (*John R. Weigel* and *Joseph M. Clayton, Jr.* attorneys; *Joseph M. Clayton Jr.* on the brief).

Richard H. Woods argued the cause for respondents Bay Head Improvement Association, etc; John Bowman Delaney; George P. Egbert; Lester D. Egbert; Alfred E. Johnson, Jr.; Robert L. Johnson and Roberta Johnson, h/w; Helen Loblein; John Magee & Elizabeth Magee, h/w; Edith Wells Pardoe and Martha L. Van Emburgh (*Schuman & Butz*, attorneys).

SUPREME COURT OF NEW JERSEY, 1984.

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Frank J. O'Brien submitted a letter brief, *pro se*.

Clyde A. Szuch submitted briefs, *pro se* (*Clyde A. Szuch*, attorney; *J. Michael Nolan, Jr.*, *Jeri E. Ruscoll* and *Peter A. Scarpato*, on the briefs).

The opinion of the Court was delivered by

SCHREIBER, J.

The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (1972). In *Avon* we held that the public trust applied to the municipally-owned dry sand beach immediately landward of the high water mark.¹ The major issue in this case is whether, ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body.

The Borough of Point Pleasant instituted this suit against the Borough of Bay Head and the Bay Head Improvement Association (Association), generally asserting that the defendants prevented Point Pleasant inhabitants from gaining access to the Atlantic Ocean and the beachfront in Bay Head. The proceeding was dismissed as to the Borough of Bay Head because it did not own or control the beach. Subsequently, Virginia Matthews, a

¹The dry sand area is generally defined as the land west (landward) of the high water mark to the vegetation line or where there is no vegetation to a seawall, road, parking lot or boardwalk. New Jersey Beach Access Study Commission, *Public Access to the Oceanfront Beaches: A Report to the Governor and Legislature of New Jersey* 2 (1977).

SUPREME COURT OF NEW JERSEY, 1984.

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resident of Point Pleasant who desired to swim and bathe at the Bay Head beach, joined as a party plaintiff, and Stanley Van Ness, as Public Advocate, joined as plaintiff-intervenor. When the Borough of Point Pleasant ceased pursuing the litigation, the Public Advocate became the primary moving party. The Public Advocate asserted that the defendants had denied the general public its right of access during the summer bathing season to public trust lands along the beaches in Bay Head and its right to use private property fronting on the ocean incidental to the public's right under the public trust doctrine. The complaint was amended on several occasions, eliminating the Borough of Point Pleasant as plaintiff and adding more than 100 individuals, who were owners or had interests in properties located on the oceanfront in Bay Head, as defendants.

Both sides moved for summary judgment. The trial court granted the defendants' motions except with respect to the plaintiff's claim that the public had acquired rights in the dry sand beach resulting from an implied dedication or prescriptive easement prior to 1932. When the plaintiff abandoned these claims, the trial court entered a final judgment in favor of the defendants. Upon plaintiff's appeal, the Appellate Division affirmed, one judge dissenting. Plaintiff appealed as of right, *R. 2:2-1(a)*, and also filed a petition for certification, which we granted. 91 N.J. 559, 453 A.2d 873 (1982).

The facts as gleaned from the record consisting of depositions, answers to interrogatories, admissions² and the pleadings are substantially undisputed.

²Individual defendants claim that a co-defendant's admissions may not be used against them on a summary judgment motion. We do not agree. For the purpose of the motion, admissions are similar to an affidavit of a person other than the party to the motion. We perceive of no reason why these admissions are not available for this purpose.

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I

Facts

The Borough of Bay Head (Bay Head) borders the Atlantic Ocean. Adjacent to it on the north is the Borough of Point Pleasant Beach, on the south the Borough of Mantoloking, and on the west Barnegat Bay. Bay Head consists of a fairly narrow strip of land, 6,667 feet long (about $1\frac{1}{4}$ miles). A beach runs along its entire length adjacent to the Atlantic Ocean. There are 76 separated parcels of land that border the beach. All except six are owned by private individuals. Title to those six is vested in the Association.

The Association was founded in 1910 and incorporated as a nonprofit corporation in 1932. Its certificate of incorporation states that its purposes are

the improving and beautifying of the Borough of Bay Head, New Jersey, cleaning, policing and otherwise making attractive and safe the bathing beaches in said Borough, and the doing of any act which may be found necessary or desirable for the greater convenience, comfort and enjoyment of the residents.

Its constitution delineates the Association's object to promote the best interest of the Borough and "in so doing to own property, operate bathing beaches, hire life guards, beach cleaners and policemen. . . ."

Nine streets in the Borough, which are perpendicular to the beach, end at the dry sand. The association owns the land commencing at the end of seven of these streets for the width of each street and extending through the upper dry sand to the mean high water line, the beginning of the wet sand area or foreshore. In addition, the Association owns the fee in six shore front properties, three of which are contiguous and have a frontage aggregating 310 feet. Many owners of beachfront property executed and delivered to the Association leases of the upper dry sand area. These leases are revocable by either party

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to the lease on thirty days' notice. Some owners have not executed such leases and have not permitted the Association to use their beaches. Some also have acquired riparian grants from the State extending approximately 1000 feet east of the high water line.

The Association controls and supervises its beach property between the third week in June and Labor Day. It engages about 40 employees who serve as lifeguards, beach police and beach cleaners. Lifeguards, stationed at five operating beaches, indicate by use of flags whether the ocean condition is dangerous (red), requires caution (yellow), or is satisfactory (green). In addition to observing and, if need be, assisting those in the water, when called upon lifeguards render first aid. Beach cleaners are engaged to rake and keep the beach clean of debris. Beach police are stationed at the entrances to the beaches where the public streets lead into the beach to ensure that only Association members or their guests enter. Some beach police patrol the beaches to enforce its membership rules.

Membership is generally limited to residents of Bay Head. Class A members are property owners. Class B are non-owners. Large families (six or more) pay \$90 per year and small families pay \$60 per year. Upon application residents are routinely accepted. Membership is evidenced by badges that signify permission to use the beaches. Members, which include local hotels, motels and inns, can also acquire badges for guests. The charge for each guest badge is \$12. Members of the Bay Head Fire Company, Bay Head Borough employees, and teachers in the municipality's school system have been issued beach badges irrespective of residency.

Except for fishermen, who are permitted to walk through the upper dry sand area to the foreshore, only the membership may use the beach between 10:00 a.m. and 5:30 p.m. during the summer season. The public is permitted to use the Association's

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beach from 5:30 p.m. to 10:00 a.m. during the summer and, with no hourly restrictions, between Labor Day and mid-June.

No attempt has ever been made to stop anyone from occupying the terrain east of the high water mark. During certain parts of the day, when the tide is low, the foreshore could consist of about 50 feet of sand not being flowed by the water. The public could gain access to the foreshore by coming from the Borough of Point Pleasant Beach on the north or from the Borough of Mantoloking on the south.

Association membership totals between 4,800 to 5,000. The Association President testified during depositions that its restrictive policy, in existence since 1932, was due to limited parking facilities and to the overcrowding of the beaches. The Association's avowed purpose was to provide the beach for the residents of Bay Head.

There is also a public boardwalk, about one-third of a mile long, parallel to the ocean on the westerly side of the dry sand area. The boardwalk is owned and maintained by the municipality.

The trial court held that the Association was not an arm of the Borough of Bay Head, that the Association was not a municipal agency, and that nothing in the record justified a finding that public privileges could attach to the private properties owned or leased by the Association. A divided Appellate Division affirmed. The majority agreed with the trial court that the Association was not a public agency or a public entity and that the action of the private owners through the Association established no general right in the public to the use of the beaches.

Judge Greenberg dissented. He argued that the Association's beaches are de facto public to a limited extent, being public to residents and visitors who stay in hotels. They are private to everyone else. He reasoned that Bay Head residents have the advantage of living in a municipality with public beaches, but are not troubled by having their beaches made available to out-

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siders. Judge Greenberg concluded that the Association's beaches must be open to all members of the public. However, he would not preclude any lessor from terminating his lease with the Association and thereby eliminating the public right of access to that part of the beach.

II

The Public Trust

In *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 303 (1972), Justice Hall alluded to the ancient principle "that land covered by tidal waters belonged to the sovereign, but for the common use of all the people." The genesis of this principle is found in Roman jurisprudence, which held that "[b]y the law of nature" "the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." Justinian, *Institutes* 2.1.1 (T. Sandars trans. 1st Am. ed. 1876). No one was forbidden access to the sea, and everyone could use the seashore³ "to dry his nets there, and haul them from the sea. . . ." *Id.*, 2.1.5. The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." *Id.* This underlying concept was applied in New Jersey in *Arnold v. Mundy*, 6 N.J.L. 1 (Sup. Ct. 1821).

The defendant in *Arnold* tested the plaintiff's claim of an exclusive right to harvest oysters by taking some oysters that the plaintiff had planted in beds in the Raritan River adjacent to his farm in Perth Amboy. The oyster beds extended about 150 feet below the ordinary low water mark. The tide ebbed and flowed over it. The defendant's motion for a nonsuit was granted. The Supreme Court denied the plaintiff's subsequent motion to set aside the nonsuit.

³The seashore extended to the limit of the highest winter flood, Justinian, *supra*, 2.1.3, and not the mean high water mark.

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Chief Justice Kirkpatrick, in an extensive opinion, referred to the grant by Charles II of the land comprising New Jersey with "all rivers, harbors, waters, fishings, etc., and of all other royalties, so far as the king had estate, right, title or interest therein" to the Duke of York. 6 *N.J.L.* at 85 (2d ed. 1875) (emphasis deleted). The duke had been delegated the same power as the king with respect to the land, and by virtue of the charter could divide and grant only those properties and interests that the king could. The Chief Justice's analysis then turned to the power of the English king. According to English law, public property consisted of two classes. Some was necessary for the state's use, and the remainder was common property available to all citizens. Chief Justice Kirkpatrick wrote that "[o]f this latter kind, according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish and the wild beasts." *Id.* at 86. He argued that "though this title, strictly speaking, is in the sovereign, yet the use is common to all the people." *Id.* He pointed out the significant difference between public property necessary for the state and common property:

The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose; it is the domain of the crown, a source of revenue; *so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.* [*Id.* at 87-88 (emphasis supplied).]

The Chief Justice traced the use of common property by the kings and concluded that appropriation of common property by William the Conqueror and his successors was questionable and that the Magna Charta rectified the prior improper conduct by

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providing "that where the banks of rivers had first been defended in his time, (that is, when they had first been fenced in, and shut against the common use, in his time) they should be from thenceforth laid open." *Id.* at 88. A charter of Henry III confirmed this principle at least to the extent that only grants of common property made before the reign of Henry II were valid. *Id.* at 89.⁴

Chief Justice Kirkpatrick concluded that all navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under the water, are "common to all the citizens, and that each [citizen] has a right to use them according to his necessities, subject only to the laws which regulate that use. . . ." *Id.* at 93. Regulation included erecting docks, harbors and wharves, and improving fishery and oyster beds. This common property had passed from Charles II to the Duke of York. Upon surrender of all rights of government in 1702, the common property reverted to the Crown of England, and upon the Revolution these royal rights became vested in the people of New Jersey. *Id.* at 94. See also J. Angell, *A Treatise on the Right of Property in Tidewaters and in the Soil and Shores Thereof* 42-43 (2d ed. 1847); D. Ducsik, *Shoreline for the Public* 89-91 (1974). Later in *Illinois Central R.R. v. Illinois*, 146

⁴Chief Justice Taney in *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410, 10 L.Ed. 997, 1013 (1842), came to substantially the same conclusion that Chief Justice Kirkpatrick did, and wrote:

The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But . . . the question must be regarded as settled in England against the right of the king since Magna Charta to make such a grant [of a portion of the soil covered by navigable waters].

It is doubtful whether the sections of the Magna Charta upon which the Chief Justices relied support the proposition that the crown could not make grants involving the tidal waters. See Note, "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," 79 *Yale L.J.* 762 (1970).

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U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1043 (1892), the Supreme Court, in referring to the common property, stated that "[t]he State can no more abdicate its trust over property in which the whole people are interested. . . . than it can abdicate its police powers. . . ." ⁵

⁵Despite the language in *Arnold v. Mundy*, there developed the notion that a shoreowner could obtain unrestricted ownership rights in the tidelands. See *Gough v. Bell*, 22 N.J.L. 441 (Sup.Ct.1850), aff'd, 23 N.J.L. 624 (E. & A. 1852); see also *Ross v. Mayor of Edgewater*, 115 N.J.L. 477, 485 (Sup.Ct. 1935), aff'd o.b., 116 N.J.L. 477 (E. & A.), cert. denied, 299 U.S. 543, 57 S.Ct. 37, 81 L.Ed. 420 (1936) (noting that owner of upland contiguous to the shore could appropriate the land between high and low water marks, provided he did not injuriously interfere with paramount right of navigation and that upon appropriation the owner had an "exclusive and indefeasible right of property"). This principle exists despite the fact that the State's title in tidelands cannot be lost by adverse possession or prescription. *O'Neill v. State Hwy. Dept.*, 50 N.J. 307, 320 (1967). The Legislature, at least up to the 1860's, granted corporate charters that included powers to occupy, possess and enjoy tide flowed land. See, e.g., L. 1833, p. 92. In addition, the Legislature had from time to time made direct grants of riparian lands. No general supervision or control seems to have been exercised by the State until 1851, when the Legislature enacted the Wharf Act, which authorized counties to grant licenses to riparian owners to construct wharves in tidal waters. L. 1851, p. 335.

The Wharf Act was modified in 1869 to exclude the Hudson River, New York Bay and Kill Von Kull. L. 1869, c. 383, § 3. It was repealed in 1891, and the Riparian Commission was authorized to sell riparian grants. L. 1891, c. 124, § 3; N.J.S.A. 12:3-4. The Commission's administration was extremely lax and it frequently sold or leased in perpetuity riparian rights for inadequate amounts. See *1873 Report of the Riparian Commissioners* 5, which states that "[t]he Commissioners, in all cases, favor a liberal arrangement with shore owners, and deem that it is for the mutual interest and advantage of the riparian owners and of the State, to fix a valuation where the lands under tidal water along the whole frontage of the riparian owner are taken at one time, at such reasonable rates as will enable such owners, for a moderate sum which will not be burdensome, to acquire the ownership and control of such lands, and also secure an immediate return therefor to the State treasury." See *Report of the New Jersey Committee to Investigate Granting of Riparian Lands by the State, Etc.* (1907); see also Platt, "With Rivers and Harbors Unsurpassed: New Jersey and Her Tidelands, 1860-1870," 99 N.J. Hist. 145 (1981). One commentator states that decisional law post-*Arnold* acquiesced in legislative

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In *Avon*, Justice Hall reaffirmed the public's right to use the waterfront as announced in *Arnold v. Mundy*. He observed that the public has a right to use the land below the mean average high water mark⁶ where the tide ebbs and flows. These uses have historically included navigation and fishing. In *Avon* the public's rights were extended "to recreational uses, includ-

and private derogation of the common rights so that by 1973 the "legal and equitable tidalwater resource title had, practically, been squeezed from the citizenry." Jaffee, "The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: *Neptune City v. Avon-By-The-Sea*—A Case of Happy Atavism?," 14 *Nat. Resources J.* 309, 310 (1974).

We are not unmindful of the principle that proceeds received by the State from the sale of property lying under water constitute a part of the permanent school fund. *N.J.S.A.* 18A:56-5, -6; see *N.J. Const.* (1947), Art. VIII, § IV, par. 2; *N.J. Const.* (1844), Art. IV, § VII, par. 6. The fact that compensation has been paid for grants and leases may not eliminate per se the public's right to some use of the common property for a public purpose. Compare *Schultz v. Wilson*, 44 *N.J. Super.* 591, 597 (App. Div.), certif. denied, 24 *N.J.* 546 (1957), which stated that "[t]he Legislature has the power, absolute and limited, to regulate, abridge or vacate public rights in tidal waters except in the field reserved to Congress by the Federal Constitution," with *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 *N.J.* 296, 308 (1972), asserting that the Legislature may not have had unlimited power to convey trust lands or "at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters." See also *N.J. Sports & Exposition Authority v. McCrane*, 61 *N.J.* 1, 67-68, 292 *A.2d* 545 (Hall, J., concurring in part and dissenting in part) (stating that the public trust doctrine does not prohibit all alienation by the state of riparian lands, but that conveyances are subject to use by the public depending on the nature of the land), appeal dismissed *sub nom. Borough of East Rutherford v. N.J. Sports & Exposition Authority*, 409 *U.S.* 943, 93 *S.Ct.* 270, 34 *L.Ed.2d* 215 (1972). The leasing and granting of foreshore and ocean beach property by the state not inconsistent with the public interest are unquestionably valid.

⁶The high water mark is the "line formed by the intersection of the tidal plane of mean high tide with the shore." *O'Neill v. State Hwy. Dep't*, 50 *N.J.*

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ing bathing, swimming and other shore activities." 61 N.J. at 309. Compare *Blundell v. Catterall*, 5 B. & Ald. 268, 106 Eng.Rep. 1190 (K.B.1821) (holding no right to swim in common property) with *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842) (indicating right to bathe in navigable waters). The Florida Supreme Court has held:

The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has. [*White v. Hughes*, 139 Fla. 54, 59, 190 So. 446, 449 (1939).]

It has been said that "[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state." *N.J. Sports & Exposition Authority v. McCrane*, 119 N.J.Super. 457, 488 (Law Div.1971), aff'd, 61 N.J. 1, appeal dismissed *sub nom. Borough of East Rutherford v. N.J. Sports & Exposition Authority*, 409 U.S. 943, 93 S.Ct. 270, 34 L.Ed.2d 215 (1972). Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare. The public's right to enjoy these privileges must be respected.

In order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches. See *Lusardi v. Curtis Point Property Owners Ass'n*, 86 N.J. 217, 228 (1981). In *Avon* we struck down a municipal ordinance that required nonresidents to pay a higher fee than resi-

307, 323 (1967). The mean or ordinary high tide is a mean of all high tides over a period of 18.6 years. *Id.* at 324; see also *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 26-27, 56 S. Ct. 23, 31, 80 L.Ed. 9, 20 (1935).

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dents for the use of the beach. We held that where a municipal beach is dedicated to public use, the public trust doctrine "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible." 61 N.J. at 309. The Court was not relying on the legal theory of dedication, although dedication alone would have entitled the public to the full enjoyment of the dry sand. Instead the Court depended on the public trust doctrine, impliedly holding that full enjoyment of the foreshore necessitated some use of the upper sand, so that the latter came under the umbrella of the public trust.

In *Van Ness v. Borough of Deal*, 78 N.J. 174 (1978), we stated that the public's right to use municipally-owned beaches was not dependent upon the municipality's dedication of its beaches to use by the general public. The Borough of Deal had dedicated a portion of such beach for use by its residents only. We found such limited dedication "immaterial" given the public trust doctrine's requirement that the public be afforded the right to enjoy all dry sand beaches owned by a municipality. 78 N.J. at 179-80.

III

Public Rights in Privately-Owned Dry Sand Beaches

In *Avon* and *Deal* our finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality. We now address the extent of the public's interest in privately-owned dry sand beaches. This interest may take one of two forms. First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public in municipal beaches under *Avon* and *Deal*, namely, the right to sunbathe and generally enjoy recreational activities.

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Beaches are a unique resource and are irreplaceable. The public demand for beaches has increased with the growth of population and improvement of transportation facilities. Furthermore the projected demand for salt water swimming will not be met "unless the existing swimming capacities of the four coastal counties are expanded." Department of Environmental Protection, *Statewide Comprehensive Outdoor Recreation Plan* 200 (1977). The DEP estimates that, compared to 1976, the State's salt water swimming areas "must accommodate 764,812 more persons by 1985 and 1,021,112 persons by 1995." *Id.* See also Note, "Public Access to Beaches: Common Law Doctrines and Constitutional Challenges," 48 *N.Y.U.L. Rev.* 369 (1973). Sensitivity to the increased demand and limited supply was voiced by Justice Pashman in *Lusardi v. Curtis Point Property Owners Ass'n*, 86 N.J. 217, 227-28 (1981), when he wrote:

Oceanfront property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced "availability to the public of its priceless beach areas," *Van Ness v. Borough of Deal*, 78 N.J. 174, 180 (1978). This concern is reflected in a statewide policy of encouraging, consonant with environmental demands, greater access to ocean beaches for recreational purposes. Expressions of this policy can be found in three sources: the decisions of this Court concerning the public trust doctrine, *Van Ness v. Borough of Deal*, *supra*; *Hyland v. Borough of Allenhurst*, 78 N.J. 190 (1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, *supra*, legislation such as the Beaches and Harbors Bond Act of 1977, L.1977, c. 208, and the Coastal Resource and Development Policies promulgated by the Department of Environmental Protection, N.J.A.C. 7:27E-1.1 to -9.23.

Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if

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not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.

Judge Best, in his dissent in *Blundell v. Catterall*, 5 B. & Ald. 268, 275, 106 Eng. Rep. 1190, 1193 (K.B. 1821), stated that passage to the seashore was essential to the exercise of that right. He believed that bathing in the tidal waters was an essential right similar to that of navigation and served the general welfare by promoting health and the ability to swim. 5 B. & Ald. at 278-79, 106 Eng. Rep. at 1194. (Best, J., dissenting). Though respecting the interest of the private owner, Judge Best observed that the greatest part of the seashore had been barren and therefore had not become exclusive property. "It is useful only as a boundary and an approach to the sea; and therefore, ever has been, and ever should continue common to all who have occasion to resort to the sea." *Id.* at 283-84; 106 Eng. Rep. at 1196. Judge Best would have held on principles of public policy "that the interruption of free access to the sea is a public nuisance. . . . The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours." *Id.* at 287, 106 Eng. Rep. at 1197.

The touchstone of Judge Best's reasoning is that the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved. Thus an undeveloped segment of the shore may have been available and used for access so as to establish a public right-of-way to the wet sand. Or there may be

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publicly-owned property, such as in *Avon*, which is suitable. Or, as in this case, the public streets and adjacent upland sand area might serve as a proper means of entry. The test is whether those means are reasonably satisfactory so that the public's right to use the beachfront can be satisfied.

The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed.⁷ The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. *See State ex rel. Thornton v. Hay*, 254 Or. 584, 599-602, 462 P.2d 671, 678-79 (1969) (Denecke, J., concurring). The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean. This was a principal reason why in *Avon* and *Deal* we held that municipally-owned dry sand beaches "must be open to all on equal terms. . . ." *Avon*, 61 N.J. at 308. We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.⁸

⁷Some historical support for this proposition may be found in an analogous situation where fishermen, in exercising the right of public fishery in tidal waters, were permitted to draw nets on the beach above the ordinary high water mark in the act of fishing. S. Moore & H. Moore, *The History and Law of Fisheries* 96 (1903).

⁸The Coastal Resource and Development Policies of the Department of Environmental Protection espouse a similar goal. *N.J.A.C. 7:27E-3.21(c)* states: "Unrestricted access [to the beaches, the area landward from the mean high

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We perceive no need to attempt to apply notions of prescription, *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), dedication, *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), or custom, *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), as an alternative to application of the public trust doctrine. Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Avon*, 61 N.J. at 309.

Precisely what privately-owned upland sand area will be available and required to satisfy the public's rights under the public trust doctrine will depend on the circumstances. Location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner are all factors to be weighed and considered in fixing the contours of the usage of the upper sand.

Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

water line] for recreational purposes is desirable so that the beaches can be enjoyed by all residents and visitors of the state."

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V

The Beaches of Bay Head

The Bay Head Improvement Association, which services the needs of all residents of the Borough for swimming and bathing in the public trust property, owns the street-wide strip of dry sand area at the foot of seven public streets that extends to the mean high water line. It also owns the fee in six other upland sand properties connected or adjacent to the tracts it owns at the end of two streets. In addition, it holds leases to approximately 42 tracts of upland sand area. The question that we must address is whether the dry sand area that the Association owns or leases should be open to the public to satisfy the public's rights under the public trust doctrine. Our analysis turns upon whether the Association may restrict its membership to Bay Head residents and thereby preclude public use of the dry sand area.

The general rule is that courts will not compel admission to a voluntary association. *See Rutledge v. Gulian*, 93 N.J. 113, 118 (1983); *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 191, 199 (1968). Ordinarily, a society or association may set its own membership qualifications and restrictions. However, that is not an inexorable rule. Where an organization is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare related to its public characteristics. *See Guerrero v. Burlington Cty. Memorial Hospital*, 70 N.J. 344, 358 (1976).

In *Greisman v. Newcomb Hospital*, 40 N.J. 389 (1963), plaintiff, holder of a degree of osteopathy and licensed to practice medicine and surgery, sought to be admitted to the courtesy staff of the defendant hospital. The defendant hospital refused to permit the plaintiff to file an application. The defendant contended that it was a private hospital and that its actions were not

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reviewable by a court. Justice Jacobs, writing for the Court, responded:

They are private in the sense that they are nongovernmental but they are hardly private in other senses. Newcomb [Hospital] is a nonprofit organization dedicated by its certificate of incorporation to the vital public use of serving the sick and injured, its funds are in good measure received from public sources and through public solicitation, and its tax benefits are received because of its nonprofit and non-private aspects. *Cf. Fairmount Hospital, Inc. v. State Board of Tax Appeals*, 122 N.J.L. 8, 11 (Sup. Ct. 1939), *aff'd* 123 N.J.L. 201 (E. & A. 1939). It constitutes a virtual monopoly in the area in which it functions and it is in no position to claim immunity from public supervision and control because of its allegedly private nature. Indeed, in the development of the law, activities much less public than the hospital activities of Newcomb, have commonly been subjected to judicial (as well as legislative) supervision and control to the extent necessary to satisfy the felt needs of the times. [*Id.*, 40 N.J. at 396.]

In considering the public interest, Justice Jacobs noted that the defendant hospital was the only available hospital where the plaintiff practiced and that the hospital was operated not for private ends but for the benefit of the public. Justice Jacobs concluded that "courts would indeed be remiss if they declined to intervene where . . . the [hospital's] powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good." *Id.* at 404.

In *Falcone v. Middlesex Cty. Medical Society*, 34 N.J. 582 (1961), plaintiff, a doctor of osteopathy licensed to practice medicine and surgery, was refused membership in the defendant County Medical Society. The effect of the refusal was that the plaintiff could not obtain staff privileges at any hospital in the area. Recognizing the judiciary's reluctance to interfere with the internal affairs of membership associations, the Court stated that it would do so "in particular situations, where considerations of policy and justice were sufficiently compelling. . . ." *Id.* at 590. Noting that the Medical Society was not simply a social

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organization, the Court viewed membership as an economic necessity and asserted that courts "must be particularly alert to the need for truly protecting the public welfare and advancing the interest of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization." *Id.* at 592.

A principle that may be distilled from *Greisman* and *Falcone* is that a nonprofit association that is authorized and endeavors to carry out a purpose serving the general welfare of the community and is a quasi-public institution holds in trust its powers of exclusive control in the areas of vital public concern. *See also Marjorie Webster Jr. College v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 302 F.Supp. 459, 469 (D.D.C. 1969) (stating that court may be forced to intervene in affairs of a volutary association where the association "enjoys monopoly power in an area of vital public concern"), *rev'd on other grounds*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 (1970). When a nonprofit association rejects a membership application for reasons unrelated to its purposes and contrary to the general welfare, courts have "broad judicial authority to insure that exclusionary policies are lawful and are not applied arbitrarily or discriminately." *Greisman*, 40 N.J. at 395; *see also Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 113 N.J. Super. 371, 387-89 (Ch. Div. 1971); *Davis v. Morristown Memorial Hospital*, 106 N.J. Super. 33, 42 (Ch. Div. 1969). That is the situation here.

Bay Head Improvement Association is a non-profit corporation whose primary purpose as stated in its certificate of incorporation is the "cleaning, policing and otherwise making attractive and safe the bathing beaches" in the Borough of Bay Head "and the doing of any act which may be found necessary or desirable

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for the greater convenience, comfort and enjoyment of the residents." Its constitution states:

The objects of this corporation shall be to promote the best interests of the Borough of Bay Head and in so doing to own property, operate bathing beaches, hire life guards, beach cleaners and policemen and do any and all things which, in the judgment of their Executive Committee, may be in the best interests of the Borough of Bay Head. . . .

Shortly after the Association was incorporated and had established a plan to operate beaches that would be open to all residents of Bay Head, the Bay Head Borough Council, after discussion with the Association's members, adopted resolutions approving the plan and agreeing to cooperate with the Association in carrying out this plan "insofar as it lies within the power of the Council so to do." The municipality evidenced its cooperation thereafter in a number of ways. It provided office space without charge in the Borough Hall between 1934 and 1973. Until 1975 seven parcels that ran from public streets to the mean high tide, all owned by the Association, were not assessed and the Association paid no realty taxes for those properties. The Borough's blanket liability insurance policies in effect between 1962 and 1968 covered the Association's activities on the beach area. The Borough appropriated public funds for the Association's benefit, \$600 annually between 1936 and 1941, and \$1,000 in 1969. Six groins (stone jetties) have been installed on the beach. The Borough paid one quarter of their cost; Ocean County, one quarter; and the State, one half.

The Association's activities paralleled those of a municipality in its operation of the beachfront. The size of the beach was so great that it stationed lifeguards at five separate locations. The beach serviced about 5,000 members. The lifeguards performed the functions characteristic of those on a public beach. They posted warnings with respect to the safety of swimming. They stood ready to render assistance to anyone in need of aid. These guards were available daily throughout the summer months. The

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beach was maintained and kept clean by crews who worked each day. These crews cleaned the beach from end-to-end, including properties not leased to the Association. Membership badges were sold and guards were stationed at entrances to the beach to make certain that only those licensed could gain admittance. Further, some guards patrolled the beach to make certain that members and guests complied with the Association's rules and regulations. When viewed in its totality—its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is apparent. The Association makes available to the Bay Head public access to the common tidal property for swimming and bathing and to the upland dry sand area for use incidental thereto, preserving the residents' interests in a fashion similar to Avon.⁹

The Public Advocate has urged that all the privately owned beachfront property, if any, must be annexed to the public beachfront.

*There are nine public streets, which run in an east-west direction, that terminate at the upper dry sands of the oceanfront. With respect to seven of these streets, the Association owns the strip of dry sand stretching from the ends of these streets to the wet sands where the public has a right to bathe and swim. The Association acquired those properties to enable all Bay Head residents to enjoy the public's common interest in the beach—both swimming and bathing in the water and incidental uses in the dry sand adjacent thereto. The municipality extended its public streets, which run in an east-west direction, into the upper dry sand area in order to give the public a means of access to the beach. That this was its probable intent becomes apparent when noting the location of the terminals of these streets. The east-west streets run beyond East Avenue, which runs parallel to the ocean and is the most easterly highway running north-south in the borough, to the upland sands. The land beyond is barren. The only apparent purpose in extending these streets to the upper sands was to provide a means of ingress to and egress from the beach. *the circumstances*

Because of our holding herein, we need not decide whether the public streets may be deemed to extend to the foreshore or whether the public's right of way from the public streets to the foreshore exists because of an easement by necessity, dedication, or prescription. It has been contended that "trespass actions will not lie against New Jersey citizens who, without injuring improvements, traverse upland beach abutting a public road or street to reach foreshore." Jaffee, *supra* n. 4, at 316. See *Mayor of Jersey City v. Morris Canal and Banking Co.*, 12 N.J. Eq. 545 (E. & A. 1859)

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There is no public beach in the Borough of Bay Head. If the residents of every municipality bordering the Jersey shore were to adopt the Bay Head policy, the public would be prevented from exercising its right to enjoy the foreshore. The Bay Head residents may not frustrate the public's right in this manner.¹⁰ By limiting membership only to residents and foreclosing the public, the Association is acting in conflict with the public good and contrary to the strong public policy "in favor of encouraging and expanding public access to and use of shoreline areas." *Gion v. City of Santa Cruz*, 2 Cal.3d 29, 43, 465 P.2d 50, 59, 84 Cal.Rptr. 162, 171 (1970). Indeed, the Association is frustrating the public's right under the public trust doctrine. It should not be permitted to do so.

Accordingly, membership in the Association must be open to the public at large. In this manner the public will be assured access to the common beach property during the hours of 10:00 a.m. to 5:30 p.m. between mid-June and September, where they may exercise their right to swim and bathe and to use the Association's dry sand area incidental to those activities. Although such membership rights to the use of the beach may be broader than the rights necessary for enjoyment of the public trust, opening the Association's membership to all, nonresidents and residents, should lead to a substantial satisfaction of the public trust doctrine. However, the Association shall also make available a reasonable quantity of daily as well as seasonal badges to the nonresident public. Its decision with respect to the number of daily and seasonal badges to be afforded to nonresidents should take into account all relevant matters, such as the public

(holding that public was entitled to an extension of the street to tide water over land filled in by shore owner in front of terminus of the street as if land filled in were an alluvion).

¹⁰According to a report of the New Jersey Beach Access Study Commission, *supra* n. 1, at 21-22, app. 5, only four of the forty-eight municipalities have no publicly-owned dry beach.

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demand and the number of bathers and swimmers that may be safely and reasonably accommodated on the Association's property, whether owned or leased. The Association may continue to charge reasonable fees to cover its costs of lifeguards, beach cleaners, patrols, equipment, insurance, and administrative expenses. The fees fixed may not discriminate in any respect between residents and nonresidents. The Association may continue to enforce its regulations regarding cleanliness, safety, and other reasonable measures concerning the public use of the beach. In this connection, it would be entirely appropriate, in the formulation and adoption of such reasonable regulations concerning the public's use of the beaches, to encourage the participation and cooperation of all private beachfront property owners, regardless of their membership in or affiliation with the Association.

The Public Advocate has urged that all the privately-owned beachfront property likewise must be opened to the public. Nothing has been developed on this record to justify that conclusion. We have decided that the Association's membership and thereby its beach must be open to the public. That area might reasonably satisfy the public need at this time. We are aware that the Association possessed, as of the initiation of this litigation, about 42 upland sand lots under leases revocable on 30 days' notice. If any of these leases have been or are to be terminated, or if the Association were to sell all or part of its property, it may necessitate further adjudication of the public's claims in favor of the public trust on part or all of these or other privately-owned upland dry sand lands depending upon the circumstances. However, we see no necessity to have those issues resolved judicially at this time since the beach under the Association's control will be open to the public and may be adequate to satisfy the public trust interests. We believe that the Association and property owners will act in good faith and to the satisfaction of the Public Advocate. Indeed, we are of the opinion that all parties

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will benefit by our terminating this prolonged litigation at this time.

The record in this case makes it clear that a right of access to the beach is available over the quasi-public lands owned by the Association, as well as the right to use the Association's upland dry sand. It is not necessary for us to determine under what circumstances and to what extent there will be a need to use the dry sand of private owners who either now or in the future may have no leases with the Association. Resolution of the competing interests, private ownership and the public trust, may in some cases be simple, but in many it may be most complex. In any event, resolution would depend upon the specific facts in controversy.

None of the foregoing matters were fully argued or briefed, the disputes concerning rights in and to private beaches having been most general. All we decide here is that private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.

We realize that considerable uncertainty will continue to surround the question of the public's right to cross private land and to use a portion of the dry sand as discussed above. Where the parties are unable to agree as to the application of the principles enunciated herein, the claim of the private owner shall be honored until the contrary is established.

The modifications in the membership and daily badge practice we have decided upon here shall be made effective for the next summer season commencing June 1, 1984.

The judgment of the Appellate Division is reversed in part and affirmed in part. Judgment is entered for the plaintiff against

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the Association. Judgment of dismissal against the individual property owners is affirmed without prejudice. No costs.

For reversal in part; affirmance in part—Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK and O'HERN—6.

Opposed—None.
